Amazing Place Sdn Bhd v Couture Homes Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S22–206 OF 2010
ZABARIAH MOHD YUSOF JC
4 JUNE 2010

Civil Procedure — Injunction — Interlocutory injunction — Restrain first defendant developer from modifying or altering unit purchased by plaintiff — Whether exist serious questions to be tried — Balance of convenience — Adequacy of damages

Civil Procedure — Striking out — Application to strike out action — Whether plaintiff induced to purchase unit by first defendant's oral representation — Whether action against first defendant should be struck out

Evidence — Oral agreement — Allegation of oral representations made to induce plaintiff to enter into contract — Whether admissible to contradict or vary terms of SPA and deed of mutual covenant — Whether documentary evidence negated any oral representation — Evidence Act 1950 ss 91 & 92

The purchaser was at all material times the purchaser of one of the commercial units in the development project known as 'Empire Subang', while the first defendant was the developer of the said project. On 9 May 2007 the parties executed a sale and purchase agreement ('the SPA') and the deed of mutual covenant for the purchase of the unit referred to as LG27 in the said project. The plaintiff also paid the initial sum of RM25,300 and the sums agreed as deposit for LG27, as required under the SPA. The plaintiff then commenced an action against the defendants alleging that it was induced to purchase the unit referred to as LG27 by the first defendant's oral representation that the said unit would have dual frontage or entrance. The first defendant denied having made the oral representation and submitted that the terms of the SPA and the deed of mutual covenant negated the plaintiff's allegation. The first defendant also submitted that the unit referred to as LG27 had been renumbered and re-designated as LG26 due to an amendment in the building plan approved by the authorities. The plaintiff then filed the instant application for an interlocutory injunction to restrain the first defendant and its servants or agents from, inter alia, modifying or altering the lower ground floor plan for LG27A in the SPA save to complete it for delivery of vacant possession to the plaintiff. The basis of the plaintiff's application for an injunction was that there were triable issues in relation to the alleged oral representation by the first

defendant, the interpretation of the terms of the SPA and the conflicting building plans. The first defendant on the other hand applied to strike out the plaintiff's claim under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC') on the grounds that there was no reasonable cause of action against it. The instant judgment is in respect of both these applications.

Held, dismissing the plaintiff's application with costs and allowing the first defendant's application with costs:

(1) It is settled law that parties are bound by the terms of the contract that they have entered into at arm's length. Thus even if the first defendant's representative had made the oral representation that LG27 had a dual frontage or entrance, which had been denied by the first defendant, the terms of the SPA and the deed of mutual covenant signed between the plaintiff and the first defendant negated any oral representation by the latter. As the terms of the SPA and the deed of mutual covenant signed by the plaintiff were clear and unambiguous, the plaintiff had not entered into the SPA in reliance of any oral representation made by the first defendants or its representatives. In such a situation, the duty of the court was confined to the construction of the SPA and the deed of mutual covenant, the written documents, and extrinsic evidence was not admissible by virtue of ss 91 and 92 of the Evidence Act 1950 ('the Act'). Thus, the plaintiff's reliance on the purported oral representation prior to the entry of the SPA and the deed of mutual covenant was frivolous and baseless and the plaintiff did not have a claim against the defendant as far as the oral representation was concerned (see paras 15–20, 22 & 28).

(2) The first defendant had proven that LG27 had been redesignated as LG26 in the amended building plan. The first defendant's project architect had adequately clarified that LG26 had not shifted but that it was the original LG27. In any case the plaintiff had in its own documents, ie emails and letters, admitted that the unit it had purchased was now LG26. Hence the renumbering of LG27 was a non-issue and whatever happened to LG27 was not the plaintiff's concern since it was not the plaintiff's unit (see paras 30 & 33–36).

(3) As the plaintiff was only concerned with monetary yield, damages would be an adequate remedy in the event that the court found at a later stage that the order not to grant an injunction was wrongly given (see paras 44–45).

(4) There was no status quo to maintain and no issues to be tried. Thus the balance of convenience was not granting the injunction against the defendants (see para 46).

(5) The plaintiff had no cause of action against the first defendant and its claim was frivolous and vexatious and an abuse of the court process. As such, it warranted a striking out under O 18 r 19 (1) of the RHC (see para 48).

[Bahasa Malaysia summary

Pembeli pada setiap masa matan merupakan pembeli salah satu daripada unit dalam projek pembangunan yang dikenali sebagai 'Empire Subang', manakala defendan pertama merupakan pemaju projek tersebut. Pada 9 Mei 2007, pihak-pihak telah menyempurnakan perjanjian jual beli ('PJB') dan surat ikatan waad bersama untuk belian unit yang dirujuk sebagai LG27 dalam projek tersebut. Plaintif juga telah membayar jumlah pendahuluan RM25,300 dan jumlah yang dipersetujui sebagai deposit untuk LG27, sepertimana dikehendaki di bawah PJB. Plaintif kemudian telah memulakan tindakan terhadap defendan-defendan mengatakan yang ia telah dipengaruhi untuk membeli unit yang dirujuk sebagai LG27 oleh representasi lisan defendan pertama yang unit tersebut mempunyai dua bukaan depan atau pintu masuk. Defendan pertama menafikan telah membuat representasi lisan dan berhujah bahawa syarat-syarat PJB dan surat ikatan waad bersama menyangkal pengataan plaintif. Defendan pertama juga berhujah bahawa unit yang dirujuk sebagai LG27 telah dinombori semula dan ditandakan semula sebagai LG26 akibat pembetulan dalam pelan bangunan yang diluluskan oleh pihak berkuasa. Plaintif kemudian telah memfailkan permohonan ini untuk injunksi interlokutori bagi menghalang defendan pertama dan pekerja atau ejennya daripada, antara lain, mengubah suai atau meminda pelan bawah untuk LG27A dalam PJB bagi tujuan menyiapkannya untuk milikan kosong kepada plaintif. Asas permohonan plaintif untuk injunksi adalah bahawa isu-isu yang perlu dipertikaikan berkaitan representasi lisan yang dikatakan oleh defendan pertama, tafsiran syarat-syarat PJB dan pelan-pelan bangunan yang bercanggah. Defendan pertama sebaliknya telah memohon untuk membatalkan tuntutan plaintif di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa tiada kausa tindakan munasabah terhadapnya. Penghakiman ini adalah berkaitan kedua-dua permohonan tersebut.

Keputusan, menolak permohonan plaintif dengan kos dan membenarkan permohonan defendan pertama dengan kos:

(1) Adalah undang-undang tetap bahawa pihak-pihak terikat oleh syarat-syarat kontrak yang telah dimasuki oleh mereka. Oleh itu jikapun wakil defendan pertama telah membuat representasi lisan bahawa LG27 mempunyai dua bukaan depan atau pintu masuk, yang telah dinafikan oleh defendan pertama, syarat-syarat PJB dan surat ikatan waad bersama yang ditandatangani antara plaintif dan defendan pertama menyangkal apa-apa representasi lisan oleh defendan

pertama. Oleh kerana syarat-syarat PJB dan surat ikatan waad bersama yang ditandatangani oleh plaintif adalah jelas dan tidak taksa, plaintif tidak memasuki PJB bergantung kepada apa-apa representasi yang dibuat oleh defendan-defendan pertama atau wakil-wakilnya. Dalam keadaan sedemikian, kewajipan mahkamah terbatas kepada pembentukan PJB dan surat ikatan waad bersama, dokumen-dokumen bertulis, dan keterangan ekstrinsik yang tidak boleh diterima menurut ss 91 dan 92 Akta Keterangan 1950 ('Akta'). Oleh itu, sandaran plaintif atas representasi lisan yang bertujuan itu sebelum kemasukan PJB dan surat ikatan waad bersama adalah remeh dan tidak berasas dan plaintif tidak mempunyai tuntutan terhadap defendan setakat mana representasi lisan adalah berkaitan (lihat perenggan 15–20, 22 & 28).

(2) Defendan pertama telah membuktikan bahawa LG27 telah ditandakan semula sebagai LG26 dalam pelan bangunan yang dipinda. Projek arkitek defendan pertama telah dijelaskan dengan secukupnya bahawa LG26 tidak dialih tetapi bahawa ianya LG27 yang asal. Dalam apa keadaan plaintif mempunyai dalam dokumennya sendiri, iaitu e-mel dan surat, mengakui bahawa unit yang dibelinya adalah LG26 sekarang. Justeru itu LG27 yang dinombori semula bukan satu isu dan apa yang berlaku kepada LG27 bukan perkara yang perlu dikisahkan oleh plaintif kerana ia bukan unit plaintif (lihat perenggan 30 & 33–36).

(3) Oleh kerana plaintif hanya mementingkan hasil kewangan, ganti rugi merupakan remedi yang sesuai jika mahkamah mendapati di peringkat kemudian bahawa perintah agar injunksi tidak diberikan telah salah diberikan (lihat perenggan 44–45).

(4) Tiada status quo untuk dikekalkan dan tiada isu-isu yang perlu dibicarakan. Oleh itu imbangan kesesuaian adalah untuk tidak memberikan injunksi terhadap defendan-defendan (lihat perenggan 46).

(5) Plaintif tiada kausa tindakan terhadap defendan pertama dan tuntutannya adalah remeh dan menyusahkan dan satu penyalahgunaan proses mahkamah. Oleh itu, ia wajar dibatalkan di bawah A 18 k 19(1) KMT (lihat perenggan 48).]

Notes

For a case on oral agreement in general, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1981.

For cases on application to strike out action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7482–7494.

For cases on interlocutory injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3544–3691.

Cases referred to

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (folld)
Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164, SC (folld)
Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11, HC (refd)
Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585, CA (refd)
Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357; [2003] 4 CLJ 294, CA (refd)
Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd [2004] 6 MLJ 1, HC (refd)
Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight [1983] 1 MLJ 220, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
Rules of the High Court 1980 O 18 r 19(1), (1)(a), (b), (d)

Liza Chan (CM Chew & Alex Wong with her) (Liza Chan & Co) for the plaintiff.
Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) (Yap Su & Associates) for the defendants.

Zabariah Mohd Yusof JC:

[1] Enclosure 3 is the plaintiff's application for an interlocutory injunction to restrain the first defendant and its servants or agents from:

(a) modifying, altering or dealing in any manner whatsoever with LG27 which is identified and marked in the lower ground floor plan of the sale and purchase agreement dated 9 May 2007 made between the first defendant and the plaintiff ('the SPA');

(b) making any physical changes or amendments or modifications to the lower ground floor plan for LG27 in the SPA save to complete LG27 and to take all actions to carry out all necessary works to place it in such condition and state for delivery of vacant possession to the plaintiff until trial of this action.

[2] Enclosure 10 is the first defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980.

BACKGROUND FACTS

[3] The first defendant is the developer of the project known as 'Empire Subang' and the plaintiff is the purchaser for one of the commercial units (the parcel) in the said project.

[4] A SPA and the deed of mutual covenant was signed by the plaintiff and the first defendant.

[5] The plaintiff's case is that it was induced to purchase parcel LG27 on the first defendant's oral representation that parcel LG27 would have dual frontage or entrance.

[6] The first defendant denies this and said that there is no dual frontage or entrance. The first defendant also says that the plaintiff's parcel is LG26.

[7] The first defendant further contended that LG27 has been renumbered and re-designated as LG26. The first defendant also denies the existence of the oral representation and alleges that the term of the SPA and the deed of mutual covenant negates the plaintiff's allegation.

[8] The plaintiff then filed the application herein for an interlocutory injunction to restrain the first defendant and its servant or agents from, inter alia, modifying, altering, dealing, make any changes or modifications to the lower ground floor plan for LG27 in the SPA save to complete LG27 and to take all actions or carry out all necessary works to place it in such conditions and state for delivery of vacant possession to the plaintiff until trial of this action.

[9] The basis of the plaintiff's application is that:

(a) there is a serious issue to be tried or triable issues in relation to the oral representation, interpretation of the SPA and the conflicting building plans; and

(b) the justice of the case lies with the plaintiff since this case involved immovable property, damages is not an adequate remedy.

[10] The first defendant on the other hand filed an application to strike out the plaintiff's claim under O 18 r 19(1) of the RHC on the grounds that:

(a) there is no reasonable cause of action at all and the plaintiff's case should be struck out in limine;

(b) without a reasonable cause of action, any injunction application will also collapse; and

(c) the agreement and the deed completely negates the plaintiff's allegation. The agreement and the deed clearly stipulates, inter alia, that the first defendant has the right to amend, vary, substitute or expand, and/or any manner deal with the parcel without the need to

seek consent from the plaintiff.

THE COURT'S FINDINGS

[11] The principle in granting an interlocutory injunction has been set out in the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 in that:

(a) whether the totality of the facts presented discloses a bona fide issues to be tried;

(b) where the balance of convenience lies; and

(c) whether damages is adequate remedy.

WHETHER THERE ARE BONA FIDE TRIABLE ISSUES

[12] The plaintiff in its affidavit in encl 3A avers that on 15 April 2007 the representative of the plaintiff had gone to the first defendant's showroom when the first defendant was promoting various units in Empire Subang for sale to investors and the public. The plaintiff met with Danny Cheah, the first defendant's director. The plaintiff also met with Wong Shu Fern, the first defendant's sales representative. The plaintiff was interested to purchase a retail outlet in Empire Subang to be rented out as a food and beverage outlet and the plaintiff's selection was parcel LG23 on the lower ground floor. The plaintiff however changed to parcel Lot LG27 when Wong Shu Fern told the plaintiff that the plaintiff could purchase a bigger unit. Hence the plaintiff's contends that the plaintiff's purchase of LG27 was induced by the oral representations by the first defendant that:

(a) LG27 is located on the lower ground floor of the Empire Mall;

(b) LG27 is a food and beverage outlet;

(c) LG27 is a parcel with dual frontage and dual entrance;

(d) LG27 has an entrance from outside of the Empire Mall which faces the main road;

(e) The first defendant would bear the interest on the purchase price released by the purchaser's financier during construction of LG27.

[13] It was further contended that the first defendant also gave the plaintiff:

(a) Brochure for Empire Subang;

(b) OCBC commercial property loan packages for interested purchasers of the Empire Mall;

(c) The lower ground floor plan indicating LG27's location and marking it as a food and beverage outlet.

[14] Therefore in reliance on the first defendant's oral and written representations, the plaintiff signed the first defendant's purchase application form and paid an initial sum of RM25,300 and subsequently a further sum of RM203,885 as deposit for LG27.

[15] The plaintiff's email dated 25 January 2010 also supports that the first defendant director made the oral representation that LG27 has a dual frontage or entrance.

[16] However the defendant denies making the said oral representation as evidenced in para 9 of the defendant's affidavit in encl 12. As far as the defendant is concerned there has been no oral representation with regards to the parcel having a dual entrance or frontage or an entrance from inside the Empire Mall. The defendant vehemently states that Wong Shu Fern was not authorised to make any oral representation as to the design and description of the parcel upon construction on behalf of the first defendant.

[17] However, my considered view on the purported oral representation is this: even presuming for a moment that Wong Shu Fern has the authority to make such a representation (which had been denied by the defendant), the terms in the agreement signed between the plaintiff and the first defendant negates any oral representation by the defendant. The relevant clauses are as follows:

Clause 25 of the Deed of Mutual Covenant (p 108 of encl 12):

BINDING EFFECT

This Deed supersedes any previous arrangement, brochures, advertisements, notices and/or agreement made by the vendor in relation to the matters dealt with herein and represents the entire agreement between the parties, in relation thereto.

Clause 32.5 of the Deed of Mutual Covenant (p 110 encl 12):

NO REPRESENTATION

The vendor shall not be bound by any representations or promises with respect to the parcel and/or its appurtenances except as expressly set forth in this Agreement with the object and the intention that the whole of agreement between the vendor and the Purchaser is set forth herein ...

Clause 32.6 of the Deed of Mutual Covenant (p 111 of encl 12):

> ENTIRETY OF AGREEMENT/NO RELIANCE ON REPRESENTATION
>
> This Agreement together with the Schedules and Appendices hereto constitutes the entire agreement and supersedes any earlier agreement, negotiations and/or understanding between the parties hereto. The purchaser hereby further declares that he has entered into this Agreement without relying on any representations made by the vendor(s), its servants or agents.

[18] It is settled law, that parties are bound by the terms of the contract that they have entered into at arm's length. The decision of the Court of Appeal in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357; [2003] 4 CLJ 294 is relevant for our purposes herein, where the court referred to the following in relation to the principles of construction of contract at p 363 (MLJ); p 301 (CLJ):

> In *Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
> >
> > > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made; it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
>
> In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Son (St Helens) Ltd* case when it says at p 1290:
>
> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[19] Now what does the SPA and the deed of mutual covenant which was entered between the plaintiff and the defendant states? Clauses 25, 32.5 and 32.6 of the deed of mutual covenant are clear and unambigous. The plaintiff had signed the SPA and the deed of mutual covenant and thus is bound by its terms.

[20] The clauses in the deed of mutual covenants are very clear in that the plaintiff is wholly aware that it had entered into the SPA and the deed of mutual covenant not in reliance of any representation or statement made by the vendor (the first defendant) before the signing of the SPA and the deed of mutual covenant.

[21] I am also minded to refer to ss 91 and 92 of the Evidence Act 1950 which excludes any extrinsic evidence from being adduced for the purposes of contradicting, varying, adding to, or subtracting from the terms of the said tenancy.

[22] In support is the case of *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 where the Supreme Court held that where the written contracts are clear and unambiguous the courts should not go behind the written terms of the contract to introduce or add new terms to it as the duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of ss 91 and 92 of the Evidence Act.

[23] Further, in the case of *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11 the judgment of Abdul Aziz Mohamad J states that:

> The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended, that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. By agreeing therefore to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92.

[24] The above case *Macronet Sdn Bhd v RHB Bank Sdn Bhd* was cited with approval in the Court of Appeal in the case of *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585 states in its judgment:

> It is clear that the action by the appellant was to enforce the terms of the deed and the letter of guarantee. It was a claim based upon the respondents' contractual obligations arising from the deed and the letter of guarantee which are, as seen earlier, couched in words which are clear and unambiguous.

Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it. See also *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229. The respondent did not challenge the validity of the contract on the ground of fraud or want or failure of consideration. What they sought to do was to attempt to establish that when the demand for payment was made to them the appellant had made some fraudulent misrepresentation. In a situation like this the duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of ss 91 and 92 of the Evidence Act.

[25] Thus after executing the SPA and the deed of mutual covenant with the presence of the entire agreement clause, the plaintiff has agreed not to resort to the exceptions in s 92 of the Evidence Act 1950. Similarly as in the case of *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* there was no challenge on the validity of the contract on the ground of fraud or want or failure of consideration. The plaintiff only relies on the fact that the first defendant had allegedly made some oral representations that induces the plaintiff to enter into the SPA and the deed of mutual covenant to purchase lot LG27.

[26] The case cited by the plaintiff ie *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 does not involve an entire agreement clause.

[27] In addition to the clauses in the deed of mutual covenants as stated aforesaid, pursuant to the clause in the SPA and the deed of mutual covenant, which are:

(a) Recital (c) of the SPA;

(b) Clause 10.1 of the SPA;

(c) Clause 20.1 of the SPA;

(d) Clause 4.2 of the deed of mutual covenant;

(e) Clause 4.3 of the deed of mutual covenant;

(f) Clause 12.1 of the deed of mutual covenant;

(g) Clause 10.3 of the SPA, provides, inter alia, that:

(i) the first defendant has a right to amend, vary, substitute, extend, expand/reconstruct and/or any manner deal with the parcel without the need to seek consent from the plaintiff;

(ii) the plaintiff shall accept any changes, variations, notification and any adjustment of the parcel;

(iii) No error or misstatement as to the description of the area of the parcel shall annul the sale of the parcel;

(iv) the position and description of the parcel are not guaranteed to be correct; and

(v) the first defendant shall not be in anyway liable to the plaintiff if the first defendant is unable to fulfill any of the obligations under the said agreement.

[28] Therefore the plaintiff's reliance on the purported oral representation prior to the entry of the said SPA and the deed of mutual covenant is indeed frivolous and baseless. The clear and unambiguous terms of the SPA and the deed of mutual covenants which the plaintiff is bound, points to the fact that the plaintiff does not have any basis of claim against the defendant, as far as the oral representation is concerned.

ISSUE ON THE RENUMBERING OF LG27

[29] The plaintiff, through Dato' Hew Hoi Lam, a practicing architect, has affirmed an affidavit in encl 4 at paras 5 and 6 states that from the plans in exh HHL1 which was shown to him, he was of the view that the plaintiff's unit, LG27 is still the second unit except that its area has increased in size in the as built plan. Hence he concluded that LG27's location in both the plans has not changed. The plan HHL1 is a plan prepared by Retail Network Sdn Bhd.

[30] It has been proven by the first defendant that LG27 has been redesignated as LG26 in the amended building plan. This has been explained in the affidavit of the defendant at para 16 of encl 12 which states that on 4 August 2009 LG27 in the said agreement has been renumbered and redesignated as LG26 on site and on the building plan due to an amendment to the building plan approved by the authorities. The amendment to the building plan is where the main entrance for the complex has been shifted and the staircase next to the original LG28 (as can be seen from the 'lower ground floor plan' of the agreement at p 65 of encl 12) has also been shifted away.

[31] The project architect Eric Keng See Cheong had confirmed in an affidavit that the location of the parcel has not changed and LG26 in the amended building plan is at the same grid as the former LG27 in the lower ground floor plan in the agreement. This has been clearly stated by Eric Keng See Cheong who states that:

> ... the first defendant is entitled to amend the building plan, inter alia, the main entrance for the complex for the said project has been shifted and the staircase next to the original LG28 in the said agreement has been shifted away. However the location of the parcel remains the same ie within the same grid in the amended building plan as compared with the 'lower ground floor plan' of the said agreement. The numbering or designation 'LG26' or 'LG27' is just for identification purposes

and in substance, the parcel that is sold to the plaintiff pursuant to the said agreement and the said deed is still the same parcel which is now identified as 'LG26'.

[32] There is no reply to Eric's affidavit by the plaintiff so far.

[33] In fact if reference is made to exh CJY2 of encl 12, which is ground floor plan of the Empire Subang it shows that LG26 has not shifted. LG26 is the original LG27. I am in total agreement with the submission of the defendant that whatever happens to LG27 now is not the plaintiff's concern as it is not the plaintiff's unit. This is clearly stated in the affidavit of the architect Eric Keng See Cheong that the renumbered LG27 is not the unit which was purchased by the plaintiff. Further, there has been no increase in size of the parcel and exh HHL1 which was referred to by Dato' Hew in his affidavit is not the accurate floor plan as it was produced by Retail Network Sdn Bhd for the purposes of presentation for retail consultancy for the first defendant and not for construction purposes. The parcel pursuant to the agreement set out in exh HHL1 should be LG26 and not LG27 simply because LG26 in exh HHL1 represents the original LG27 in the lower ground floor plan in the said agreement and LG27 in exh HHL1 represents the original LG28 in the said lower ground floor plan in the said agreement. All these have been explained with great detail in the affidavit of the project architect, Eric Keng See Cheong in encl 11.

[34] But what is pertinent to note is that by the plaintiff's own documents the plaintiff has admitted that the parcel is now LG26. The documents are:

(a) Exhibit CJY3 of encl 12:

Alice Ng's email dated 11 January 2010 at 6.24pm referred to the parcel as 'LG26'.

Alice Ng's email dated 12 January 2010 at 2.49pm referred to the subject as 'Follow-Up on LG26, Empire Shopping Gallery'.

(b) Exhibit NBL13 of encl 3A:

Alice Ng wrote to the first defendant vide email on the subject 'Proposal to lease back LG26 to Couture Homes"

(c) Exhibit NBL19 of encl 3A:

Alice Ng wrote on the plaintiff's letter head dated 29 January 2010 referring to the parcel as 'Unit L26 (shown as LG27 in the plan').

[35] Therefore the contention of the plaintiff in their letter dated 4 March 2010 that 'LG26 is not our unit' is misconceived.

[36] Hence the renumbering of LG27 is a non-issue.

THE ADDITIONAL 312 SQ FT

[37] The email by Alice Ng of the plaintiff dated 11 January 2010 in exh CJY3 of encl 12 shows that the plaintiff acknowledges the fact that the 312 sq ft of area is owned by the first defendant. Therefore there is no issue on this 312 sq ft, as far as the claim by the plaintiff is concerned.

[38] From the documents of the first defendant, the first defendant is not agreeable to rent the 312 sq ft at the back of the parcel to the plaintiff and the parcel for the plaintiff is at 926 sq ft with no additional 312 sq ft. This is the commercial prerogative and choice of the first defendant, which the court is in no position to impose or dictate.

THE ADDITIONAL WALL ISSUE

[39] On the additional wall issue — refer to recital C of the agreement which states:

> ... the vendor shall be entitled from time to time to make such amendments variations or substitution thereto as may be required by the Appropriate Authority or as determined absolutely by the vendor and/or the vendor's consultants or architects.

[40] Hence the plaintiff is in no position to question the right of the first defendant to build the additional wall in the units/parcel which is not owned by the plaintiff and does not affect the parcel of the plaintiff.

THE PRAYERS OF THE PLAINTIFF

[41] The prayers of the plaintiff in encl 3 relates to LG27 and not LG26. Therefore the plaintiff's case herein is out of context.

[42] Unjust enrichment — LG27 is a bigger unit. The plaintiff is trying to get a bigger unit (LG27) at the price for a 926 sq ft unit which is LG26. This is not bona fide.

[43] Therefore based on the reasons stated above, the plaintiff has not shown that there is any serious issues to be tried.

DAMAGES IS AN ADEQUATE REMEDY

[44] The plaintiff is only concerned with monetary yield. The plaintiff admitted in exh NBL14 of Ng's affidavit that:

> I found a very good tenant. I hope we can keep him. We are property investors. All we want is to own properties that give us our targeted yield.

[45] It is clear by the plaintiff's own admission that their business is mainly to reap profit in investments of properties. Damages would thus be an adequate remedy in the event the court finds that at a later stage that the order of this court in not granting injunction is wrongly given. The case of *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia Bhd* [2004] 6 MLJ 1 is referred at p 32.

BALANCE OF CONVENIENCE

[46] There is no status quo to maintain. Since there is no issue to be tried the balance of convenience is in not granting the injunction against the defendants.

[47] Therefore the application for an injunction by the plaintiff in encl 3 is dismissed with costs.

ENCLOSURE 10

[48] From the aforesaid, there is no issue to be tried, clearly the plaintiff has no cause of action against the plaintiff and that the plaintiff's claim herein is frivolous and vexatious and an abuse of court process. Hence the claim by the plaintiff is obviously unsustainable and warrants a striking out under O 18 r 19(1) of the RHC 1980.

CONCLUSION

[49] Enclosure 3 is dismissed with costs (injunction application by the plaintiff).

[50] Enclosure 10 is allowed with costs (striking out application by the defendant).

Plaintiff's application dismissed with costs and first defendant's application allowed with costs.

Reported by Kohila Nesan